SUPREME COURT, U. S.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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ROBERT NEALSEAND, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A8) is reported at 424 F. 2d 639. The findings of fact and opinion of the Tax Court (Pet. B1-B17) are reported at 52 T.C. 532.

### JURISDICTION

The judgment of the court of appeals was entered on April 10, 1970. The petition for writ of cer-

tiorari was filed on June 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, after taxpayer's acquittal on motion for directed verdict of criminal charges of willful tax evasion, the doctrine of collateral estoppel precluded the Commissioner from proving in the Tax Court that the taxpayer's underpayments of tax in the same years were due to fraud.

## STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX.

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

## STATEMENT OF THE CASE

On April 11, 1961, petitioner was indicted in the United States District Court for the Southern District of New York in a two-count indictment charging that he had willfully attempted to evade his federal income taxes for 1954 and 1955 by filing false and fraudulent returns, in violation of Section 7201 of the Internal Revenue Code of 1954.[1] In a jury trial, the district court on March 15, 1965, granted petitioner's motion for acquittal at the conclusion of the Government's case (Pet. B8). In 1966, the Commissioner determined tax deficiencies and fraud penalties (disallowing most of the claimed business expenses for each year), and the Tax Court subsequently sustained the Commissioner as to both the deficiencies and the penalties (Pet. A3, B14).

The only issue presented in the court of appeals was whether the prior acquittal on the criminal charge barred a finding of fraud in the subsequent civil proceeding in the Tax Court. The court of appeals, agreeing with the Tax Court, concluded that estoppel did not apply and affirmed the Tax Court's decision (Pet. A3).

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[1] During 1954 and 1955 petitioner was employed as a real estate broker-salesman, earned commissions of $58,573.31 and $96,307.23, and claimed business expense deductions of $31,000 and $38,000 for the respective years. In 1962, petitioner filed amended returns for 1954 and 1955, in which he reduced his claimed business expenses to $12,176.33 and $17,909.13, respectively. (Pet. A2.)

## ARGUMENT

Petitioner's sole contention is that his acquittal on criminal charges of wilful tax evasion collaterally estopped the Commissioner from seeking the civil fraud penalties of Section 6653(b) for petitioner's underpayments of tax in the years for which the prosecution had been brought. This contention is not persuasive, and there is no conflict of authority involved.

Almost the identical contention was made to and rejected by this Court in *Helvering* v. *Mitchell*, 303 U.S. 391, and *United States* v. *Real Estate Boards*, 339 U.S. 485. In *Mitchell*, the Court held that a taxpayer's prior acquittal, by jury verdict, of willful attempt to evade the income tax did not estop the Commissioner from later proving in the Board of Tax Appeals that the tax return in question was fraudulent or from collecting the resulting 50 percent fraud penalties. The Court found the acquittal ineffective to create an estoppel because of the difference between the required degrees of proof in criminal and civil cases; thus, identical proof might fail in a criminal case but suffice in a civil case. 303 U.S. at 397.[2]

In *United States* v. *Real Estate Boards*, *supra*, the Court relied upon *Helvering* v. *Mitchell*, *supra*, to

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[2] Petitioner (Pet. 4-6) relies upon *Coffey* v. *United States*, 116 U.S. 436, for an opposite result. But this Court distinguished *Coffey* in *Mitchell*, *supra*, pp. 405-406, on the ground that the 50 percent fraud penalty, unlike the liquor-violation forfeiture in *Coffey*, is remedial rather than punitive. It thus construed *Coffey*, as resting on the principle of double jeopardy. See also, 1B Moore, *Federal Practice* (2d ed.), par. 0.418[3], pp. 2854-2856.

reach the same result although the prior acquittal had resulted, not from a jury verdict but, as here, but from the granting of a motion for acquittal, "apparently * * * under Rule 29 of the Federal Rules of Criminal Procedure." 339 U.S. at 493, fn. 7. Rule 29 then provided, and still provides, that a motion for acquittal shall be granted "if the evidence is insufficient to sustain a conviction of such offense or offenses"; the Court concluded that the "ruling on [the motions] did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions" (*Ibid.*).

Petitioner seeks to avoid the holdings in *Mitchell* and *Real Estate Boards* by quoting (Pet. 8) from the opinion of the court of appeals below, to the effect that "in this Circuit" the trial judge was required to submit the case to the jury "unless the prosecution has failed to present 'substantial evidence' to support a guilty verdict" (Pet. A6). The court of appeals preferred to rely on other grounds, but it should be observed that, whatever differing verbal formulas may be used to describe a trial court's duty with respect to a motion for acquittal, it is probable that a trial judge in a criminal case will subject the evidence to a more severe test on such a motion than he would apply in a civil case. See 8 Moore, *op. cit.*, par. 29.06 (1969 Cum. Supp.), p. 29-27. In fact, as the Tax Court noted (Pet. B16-B17), a district judge in the Second Circuit—the circuit of decision here—has *expressly* refused to apply a civil test in a criminal case. See *United States* v. *Melillo*, 275 F. Supp. 314, 318

(E.D. N.Y.), where the court interpreted Rule 29, supra, as requiring "a higher standard in criminal than in civil cases." Clearly, one who invokes estoppel has the burden of showing the relevance of the prior decision; yet petitioner has failed to demonstrate what test in fact was applied by Judge Sugarman in granting his motion for acquittal.

In any event, this Court did not purport to exhaust the distinctions between civil and criminal cases in its opinions in *Mitchell* and *Real Estate Boards, supra.* Here, the court of appeals rejected (Pet. A5) petitioner's contention on the basis of *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600, 602, where this Court held that collateral estoppel is confined to situations where, *inter alia*, "the controlling facts and applicable legal rules remain unchanged" and the second case involves substantially "the same bundle of legal principles that contributed to the rendering of the first judgment." The court of appeals observed that here the "bundle of legal principles" was significantly different in the Tax Court case, as compared with the criminal case:

> For example, the Government could not, in the criminal action, call Neaderland to the witness stand and examine him, though it was not barred from doing so in the subsequent civil case and thereby brought out highly probative evidence on the issue of fraud. * * * [Pet. A7].

The court also noted that the government had no right of appeal in the criminal case "to challenge the possibly erroneous standard which the trial judge ap-

plied in dismissing the case." (Pet. A8.)[3] These differences, which work against the government and in favor of the accused, explain why it would not be "even-handed" to impose collateral estoppel on the government to match that faced in civil proceedings by an accused once he is *convicted* of criminal charges. *Ashe* v. *Swenson*, 397 U.S. 436, applied the doctrine of collateral in a second *criminal* proceeding, and thus is inapposite here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.

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[3] As between two civil cases, the Restatement of the Law of Judgments, American Law Institute (1942), Sec. 69(2), adopted the following rule:

§ 69. *Effect of Appeal or Inability to Appeal.*

* * * *

(2) Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action.

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